JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 278

ARTHUR C. AMOS
Petitioner.

vs.

THE PULLMAN COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In The

Supreme Court of the United States

October Term, 1956

No.

Arthur C. Amos
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vs.

The Pullman Company,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The District Court's opinion is not reported. The District Judge granted Summary Judgment upon an affidavit of the defendant. There was no written opinion. The judge briefly remarked that the Pullman Company is not a common carrier by railroad.

The opinion of the Court of Appeals is appended hereto at pages 9-10. And as well its Judgment at page 11.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 26, 1956. The jurisdiction of this court is invoked under Title 28, Section 1257, U.S.C.A. And to use the words of this court in *Southern Pac. Co.* v. *Gileo* et al., No. 257, October Term, 1955, June 11, 1956, this case involves the interpretation of an important federal statute governing railroad employer obligations to its injured employees.

QUESTION PRESENTED

Whether an employee of the Pullman Company, working in one of its shops, on a Pullman car in interstate commerce, who is injured, can avail himself of the provisions of the Federal Employers' Liability Act, as amended?

STATUTE INVOLVED

The Federal Employers' Liability Act, as amended, 35 Stat. 65, 53 Stat. 1404, 45 U.S.C. sec. 51, hereinafter referred to as the FELA.

STATEMENT

Arthur C. Amos on July 22, 1955 filed his complaint in the United States District Court for the District of Columbia under the FELA. He is 31 years of age. He is employed in the District of Columbia in a *work shop* of the Pullman Company at Fourth and "T" Streets, Northeast. This shop is practically in the Union Station yards. He is an electrical repairman. Pullman cars are detached from trains and are serviced in these yards. There is no set time as to how long a particular car may stay in the shop. It all depends on the work to be done. All of the workers are pushed to get the work done as soon as possible, in order that the cars can continue on their interstate journey.

On April 1, 1955, while Amos was using, in this shop, a sledge on a pin, pushing out a bushing, on a truck frame

or carriage of a Pullman car, a sliver of steel, or other foreign matter, came up and hit him in his left eye. He has partially lost the sight of that eye.

The Pullman Company did not file an answer to the complaint. Instead, it filed a Motion for Summary Judgment and supported this motion with an affidavit of a Vice President. This affidavit did not controvert a single allegation of the complaint. It only showed the kind of services the Pullman Company performs. And upon this affidavit the District Judge granted Summary Judgment, making the statement "I believe upon the basis of this evidence, that the Pullman Company is not a common carrier by railroad."

The complaint of petitioner does not state that the Pullman Company is a common carrier. This is unimportant. It states that the validity of the FELA is founded on the interstate commerce clause of the Constitution, and that petitioner in his particular job was engaged in interstate commerce and hence comes under the act.

REASONS FOR GRANTING THE WRIT

There are a host of cases decided by this court under the FELA. We discussed the most important ones in our brief before our Court of Appeals. We will not discuss them here. It is unnecessary. Besides, our chart and compass is now the latest decisions of this court—*Reed* v. *Penna. RR Co.*, No. 621, October Term, 1955; and *Southern Pac. Co.* v. *Gileo* et al., No. 257, October Term, 1955. Both of these cases were decided on June 11, 1956 and the opinions were delivered by Mr. Justice Sherman Minton. We can forget everything that has gone before and stop with these two cases. Our case was decided by our Court of Appeals on April 26, 1956, nearly two months before the *Reed* and *Gileo* decisions. There can be no doubt that we would have prevailed if our Court of Appeals had them before it.

The *Reed* and *Gileo* cases are railroad cases. Our case

involves an employee of the Pullman Company and not a railroad. However, this makes no difference. Mr. Justice Minton stated the heart of the FELA in the *Gileo* case:

> "Rather the crucial question is whether any part of Gileo's duties as a railroad employee furthers interstate commerce or in any way directly or closely and substantially affects such commerce."

This is exactly what counsel for petitioner argued to our Court of Appeals, but to no avail.

In the 1939 amendment to the act, the Congress went as far as it could under the interstate commerce clause. And left it to the courts to determine as to whether or not the injured employee was engaged in the "furtherance" of interstate commerce or "in any way" engaged therein. Section 51, found in 45 U.S.C.A. secs. 51-60, second paragraph, reads:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

It will be seen from the opinion of our Court of Appeals that it predicated its judgment on three express company messenger cases. In view of the later decisions of this court these cases are not important. Only one of them got to the Supreme Court. Besides, they are not comparable to our case because our petitioner was working in a *shop* of the Pullman Company *directly* engaged in interstate commerce. It will also be observed that our Court of Appeals in its opinion also cites Senate Report No. 661, 76th Congress, 1st Session 2 (1939). This report came out of the 1939 hearings when the act was liberalized in 1939.

It is interesting to note that in the *Gileo* case, Mr. Justice Minton alludes to this Senate Report and states that the 1939 amendments broadened and clarified the law in its application to these employees. The reason our Court of Appeals referred to Senate Report 661 is because it states that "the bill as introduced was intended to broaden the application of the act to include express, freight forwarding, and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute." It seems that the bill as originally drafted specifically included the express and sleeping-car employees and after the hearings they were left out. Section 51 of the act (45 U.S.C.A. secs. 51-60) now reads: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate commerce . . . or shall, in any way directly or closely and substantially affect such commerce . . . shall be considered as entitled to the benefits of this chapter".

And Mr. Justice Minton in the *Gileo* case put the crucial question—whether any part of Gileo's duties as a railroad employee furthers interstate commerce or in any way directly or closely and substantially affects such commerce?

Petitioner feels that it is about time that Pullman Company employees working in Pullman shops on cars in interstate commerce are brought under the FELA and are considered as "railroad employees". They are definitely engaged in interstate commerce like millions of other railroad workers in railroad shops throughout the nation. We are not asking that ALL employees of the Pullman Company be brought under the act. We are only asking that the petitioner, Amos, be allowed to show in the trial court that his work brings him under the interstate commerce clause of the Constitution and hence is covered by the FELA. He has been cut off at the threshold by a Summary Judg-

ment based solely on an affidavit of a Vice President of the Pullman Company which explains only the services that company supplies. It totally disregards any mention of employees in its shops throughout the nation.

This is the first time that an employee in a shop of the Pullman Company has ever raised this question in a Federal court. And if this writ is granted and petitioner prevails in this court, then the door will be open to those *shop* employees of the Pullman Company who can show that their work brings them under the interstate commerce clause of the Constitution and hence qualifies them for coverage under the FELA, as amended.

An employee who works in a shop of the Pullman Company on Pullman cars is as much a railroad employee under the FELA as one who works in a shop of a railroad. We cannot say in one breath that a person is employed in interstate commerce, and in the next say that he is not employed by a common carrier, merely because he receives his pay from the Pullman Company and not a railroad.

Our case is much stronger than both the *Reed* and *Gileo* cases. In the *Reed* case this court extended the coverage of the act to a clerical employee of a railroad. Here in our case our petitioner was a *shop* employee. Reed was employed "entirely in the railroad's office building in Philadelphia". *Gileo* was granted relief even tho he was working on "new construction". The 1939 amendment abolished the "moment of injury" principle. We can go much further. We can show that petitioner was working on a Pullman car that was actually in interstate commerce, as defined by our courts; that it was being serviced in order to continue it on its interstate journey. We can show the time it came into the shop and the time it left the shop and the work that was done on it.

The *Gileo* case involved other injured employees besides *Gileo*. There was *Aranda*. He was injured while employed as a wheel molder in the carrier's wheel foundry. The court

said "it is thus plain that Aranda's duties as a wheel molder both served to further interstate commerce and directly or closely and substantially affected such commerce. We therefore hold that he is entitled to the benefits of the Act."

Also in the *Gileo* case there was *Moreno*. He was employed as a laborer and was injured while laying rails in a retarder yard which was being constructed for the purpose of facilitating the movement of freight trains in interstate commerce by use of a new "switching" method. The yard was to be used in connection with petitioner's main line of track. "It is clear that *Moreno*, in the performance of his duties, was furthering interstate commerce, and that his work directly or closely and substantially affected commerce within the meaning of the 1939 amendment."

Our case is much stronger. Our petitioner, Amos, is an electrical repairman and is employed in the shop of the Pullman Company in the District of Columbia. Pullman cars are detached from trains and are serviced in these yards. While Amos was using, in this shop, a sledge, on a pin, pushing out a bushing, on a truck frame or carriage of a Pullman car, a sliver of steel, or other foreign matter, came up and hit him in his left eye. As stated, the car on which he was working was being serviced on its interstate journey.

We say there is a factual question involved here and should be tried in the District Court. It is elementary that on a Motion for a Summary Judgment every doubt should be resolved against the party filing it. As this court said in the *Gileo* case "this case involves the interpretation of an important federal statute governing railroad employer obligations to its injured employees". And to say that the Pullman Company does not qualify as a "railroad employer" is an absurdity.

As the Supreme Court put it in the *Bailey case*, 319 U.S. 350, in 1943, that to deprive workers of the benefit of a

jury trial in close or doubtful cases is to take away a goodly portion of the relief which the Congress has afforded them. And in the *Griswold* case, 155 F. 2d 333 (1946), the 7th Circuit stated that the Supreme Court in a succession of cases (with one exception) has reversed every court which has held that a defendant was entitled to a direct verdict under the FELA. It should be stated that these are negligence cases. They are mentioned to show how this court feels about the FELA.

Again and again, throughout the years, the Supreme Court is called upon to construe the interstate commerce clause of the Constitution. It is not important whether or not the Congress saw fit to include express, freight-forwarding or sleeping-car companies in the 1939 amendment to the act. Because, what is interstate commerce is a JUDICIAL question and not a legislative one. As Mr. Justice Minton says, the crucial question is whether the injured employee's duties furthers or in any way affects commerce. This is the heart of the FELA. It is the only justification for passing the act. And there can be no question that the work of our petitioner "furthers" and "affects" interstate commerce.

Respectfully submitted,

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Attorney for Petitioner.

July 23, 1956

UNITED STATES COURT OF APPEALS
For The District of Columbia

No. 12991

ARTHUR C. AMOS, *Appellant*

vs.

THE PULLMAN COMPANY, *Appellee.*

Appeal from the United States District Court
for the District of Columbia

Decided April 26, 1956.

Mr. William F. McDonnell for appellant.

Mr. John E. Powell, with whom Messrs. *Arthur P. Drury* and *John M. Lynham* were on the brief, for appellee.

Before WILBUR K. MILLER, BAZELON and WASHINGTON, Circuit Judges.

PER CURIAM: Alleging that he was injured while repairing railroad sleeping cars in the course of his employment by appellee, appellant brought this suit under the Federal Employers' Liability Act, as amended, which is applicable to "every common carrier by railroad . . ." (53 Stat. 1404 (1939), 45 U.S.C. sec. 51 (1952)). The District Court granted appellee's motion for summary judgment on its view that the uncontroverted affidavit of appellee's vice president established that appellee was not

a "common carrier by railroad". On this appeal appellant insists that whether or not appellee is subject to the Federal Employers' Liability Act remains a genuine issue of material fact and must therefore be tried. We think the District Court was clearly right. See *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175 (1920); *Taylor* v. *New York Central R.R.*, 294 N.Y. 397, 404, 62 N.E. 2d 777, 780 (1945); *Latsko* v. *National Carloading Corp.*, 192 Fed. 2d 905, 909 (6th Cir. 1951); S. Rep. No. 661, 76th Cong., 1st Sess. 2 (1939).

Affirmed.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Book 54 Page 507
April Term, 1956.

No. 12,991

ARTHUR C. AMOS,
Appellant.

v.

THE PULLMAN COMPANY,
Appellee.

Filed April 26, 1956, Joseph W. Stewart, Clerk

APPEAL from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Bazelon and Washington, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant its taxable costs on this appeal and have execution therefor.

Dated: April 26, 1956.

W.K.M.

Per Curiam.

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JOHN T. FEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 278

ARTHUR C. AMOS,

Petitioner,

vs.

THE PULLMAN COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 278

ARTHUR C. AMOS,

Petitioner,

vs.

THE PULLMAN COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Question Presented

In respondent's view, the question presented here is whether the Federal Employers' Liability Act applies to all workers employed in interstate commerce, regardless of the nature of their employer's business, or only to employees of common carriers by railroad.

Counter-Statement of the Case

Petitioner sued respondent in the District Court under the Federal Employers' Liability Act, alleging that he was employed by respondent in its shop in the District of

Columbia as an electrical repairman and that, while he was using a sledge on a truck frame of a Pullman car, a sliver entered his left eye (Appellant's App. 1).

Respondent filed a motion for summary judgment on the ground that the Act by its terms applies only to common carriers by railroad and, inasmuch as respondent is not a common carrier by railroad, it is not subject to the Act (Appellant's App. 4). In support of the motion respondent filed an affidavit of its Vice President H. S. Anderson setting forth, inter alia, that The Pullman Company is not a common carrier by railroad, does not own or lease any railroad track or line of railroad, and has never owned any such track or line; that it neither owns nor operates any locomotives or engines and neither prepares nor publishes timetables or train schedules, but on the contrary is engaged exclusively in the business of furnishing parlor car and sleeping car accommodations and service to the railroads with which it has service contracts (Appellant's App. 6).

This affidavit was not contradicted by petitioner.

After argument upon the motion District Judge Tamm entered summary judgment for respondent without opinion (Appellant's App. 8).

The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court on the ground that by its terms the Act is applicable to "Every common carrier by railroad . . .", that respondent's uncontroverted affidavit established that respondent is not a common carrier by railroad, and that therefore there was no genuine issue of material fact as to whether petitioner was subject to the Act.

Argument

Sections 1 and 2 of the Act (35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. Sections 51, 52) impose liability on "Every common carrier by railroad. . . ." Petitioner does not here contend that respondent is a common carrier by railroad. Rather, his contention is that every worker engaged in interstate commerce either is or should be covered by the Act, regardless of whether or not his employer is a common carrier by railroad (Petition, Pages 3, 8). He now argues that this case is controlled by *Southern Pacific Company* v. *Gileo*, — U.S. —, 100 L. Ed. 821, and *Reed* v. *Pennsylvania Railroad Company*,—U.S. —, 100 L. Ed. 828, which were decided by this Court on June 11, 1956. However, in both of these cases it was undisputed that the employers were interstate common carriers by railroad and the sole question was whether the 1939 amendment to Section 1 of the Act was broad enough to include employees not directly engaged in interstate transportation. Therefore, neither of these cases has any bearing on the case at bar for neither is any authority for the proposition that the Act applies to employees other than those of common carriers by railroad.

The Courts have consistently held that the Act applies only to common carriers by railroad (*Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 187, 41 S. Ct. 93, 65 L. Ed. 205; *Second Employers' Liability Cases*, 223 U.S. 1, 52, 32 S. Ct. 169, 56 L. Ed. 327; *Erie R. Co.* v. *Jacobus*, 221 F. 335; *Tilson* v. *Ford Motor Company*, 130 F. Supp. 676, 677; *Kelly* v. *Delaware River Joint Commission*, 85 F. Supp. 15; *Higgins* v. *Erie R. Co.*, 89 N.J.L. 629, 99 Atl. 98), and that The Pullman Company is not subject to the Act (*Taylor* v. *New York Cent. R. Co.*, 294 N.Y. 397, 62 N.E. 2d 777, 780, cert. den. 326 U.S. 786). Cf. *Robinson* v.

Baltimore & Ohio Railroad Company, 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849.

The 1939 amendment to Section 1 made no change in the class of employers subject to the Act and therefore the *Wells Fargo* case must be deemed to have had legislative approval (*Latsko* v. *National Carloading Corp.*, 192 F. 2d 905, 909). More important than this, however, is the fact that the legislative history of the amendment shows that the Congress specifically declined to bring sleeping car companies within the Act [S. Rep. No. 661, 76th Cong. First Session, page 2, (1939)].

What petitioner really seeks is an amendment to the Act by judicial fiat.

Conclusion

It is respectfully submitted that certiorari should be denied.

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ARTHUR P. DRURY.
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